Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DARYL L. JOHNSON,

Petitioner,

v.

CAMBRIDGE INDUSTRIES, INC., and
MERIDIAN AUTOMOTIVE SYSTEMS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should district courts scour the record to read the statements of fact and admissions submitted on a motion for summary judgment before entering a summary judgment?

2. Should district courts scour the record to read the briefs submitted on a motion for summary judgment before entering a summary judgment?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

All parties appear in the caption of the case on the cover page. Petitioner is unaware of any parent company of any party. Petitioner is unaware of any publicly traded company owing 10 percent or more of the stock of any party.

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PETITION FOR WRIT OF CERTIORARI

Daryl L. Johnson respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on April 9, 2003 in order to resolve the conflict between the Seventh Circuit opinion and the Court's opinion in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) and to resolve the confusion in the lower courts on the important issue of the legal standard of what record must be reviewed by the district courts before the entry of summary judgment.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reprinted at Appendix A and it is published at 325 F.3d 892 (7th Cir. 2003). The order dated June 2, 2003 denying the petition for rehearing is reprinted at Appendix D. The Entry On Defendant's Motion For Summary Judgment is reprinted at Appendix B and it is reported at 179 F.Supp.2d 914 (S.D.Ind. 2001).

STATEMENT OF JURISDICTION

The United States Court of Appeals denied rehearing on June 2, 2003. This petition for certiorari is timely in that Petitioner has filed it within 90 days of June 2, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This matter involves Rule 56 of the Federal Rules of Civil Procedure on summary judgments. Specifically, Rule 56(c) provides as follows:

> **(c) Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

This matter also involves Rule 56.1 of the Local Rules of the United States District Court for the Southern District of Indiana, which is reprinted in Appendix E. Specifically, Local Rule 56.1(g) at the time of the motion for summary judgment stated as follows:

> **(g) Effect of Factual Assertions.** In determining the motion for summary judgment, the Court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are specifically controverted or objected to in compliance with L.R. 56.1(f). The Court will also assume for purposes of deciding the motion that facts asserted by an opposing party are true to the extent they are supported by the depositions,

discovery responses, affidavits or other admissible evidence.

The matter also involves the enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Specifically, 42 U.S.C. § 2000e-2(a) provides in pertinent part as follows:

> **(a) Employer practices**
>
> It shall be an unlawful employment practice for an employer–
>
> (1) to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

STATEMENT OF THE CASE

I. Overview of the Case

The Court of Appeals stated that it has repeatedly assured the district courts that district courts need not scour every inch of the record on a motion for summary judgment before entering summary judgment. App. A, p. 9a. Specifically, the court of appeals stated that the district court need not scour the record for the admission of the fact that a white selectee had been promoted to team leader while the black selectee had not been promoted. *Id.*

The Seventh Circuit Court of Appeals stated that it has repeatedly assured district courts that they are not

required to scour every inch of the record on a motion for summary judgment, and stated as follows:

> "We have repeatedly assured the district courts that they are not required to scour every inch of the record for evidence that is potentially relevant to the summary judgment motion before them. See, *e.g., Greer v. Board of Educ.*, 267 F.3d 723, 727 (7th Cir. 2001); *Little v. Cox's Supermarkets*, 71 F.3d 637, 641 (7th Cir. 1995) (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986))."

App. p. 9a, 325 F.3d 892, 898 (7th Cir. 2003).

The Seventh Circuit has misinterpreted the Court's *Anderson* decision, and the Seventh Circuit standard of review is contrary to the Court's *Reeves* decision, which stated as follows:

> And the standard for granting summary judgment "mirrors" the standard for judgment as a matter of law, such that "the inquiry under each is the same." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). It therefore follows that, in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record.

Reeves, 530 U.S. at 150. The Court in *Reeves* further stated as follows:

> Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. See Wright & Miller 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that

> "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Id.* at 300.

Reeves, 530 U.S. at 151. The Seventh Circuit standard of review is that the district courts are not required to read every inch of the record, and the district courts may ignore admissions of the moving party. The Supreme Court's standard requires a review of all of the evidence in the record, and requires giving credence to the evidence favoring the nonmovant as well as evidence supporting the moving party that is uncontradicted and unimpeached.

The Court of Appeals also stated that the petitioner employee had not brought the fact of the promotion of the white selectee to the attention of the district court. App. A, p. 11a, 13a, 14a. Both parties had stated the fact in their statements of fact in support of and in opposition to the motion for summary judgment. Appendices F & G. Additionally, the petitioner employee had cited that fact in the Surreply brief in opposition to the motion for summary judgment, which was the first opportunity to cite the fact after the movant Meridian's reply which admitted the fact. Appendix H.

The court of appeals' standard also creates confusion about what the legal standard is for bringing a fact to the attention of the district court before the court can enter summary judgment. Although there is too much repetition and paper already for the district courts on motions for summary judgment, the Seventh Circuit standard suggests that even more repetition is required than repeating the fact in the statement of facts in surreply and citing the fact in the next available brief. The repetition is required by the standard even in a court which has a local rule

which states that the court will assume for purposes of deciding the motion that any facts asserted by an opposing party are true to the extent they are supported by the depositions, discovery responses, affidavits or other admissible evidence. App. E.

The court of appeals has stated that it has repeatedly assured the district courts that district courts need not scour every inch of the record. App. A, p. 9a. When district courts can follow the legal standard of scouring only part of the record, the district courts ignore other parts of the record. The district courts ignore the evidence in opposition to motions for summary judgment. The district courts even ignore the admitted facts.

When district courts can scour only part of the record and ignore the facts admitted in the statement of facts submitted in the pleadings on the motion for summary judgment, the legal standard permits and assures the district courts that they can ignore not just disputed facts, but also admitted facts. When the district courts are repeatedly assured that they can ignore the admitted facts, the district courts can ignore any evidence. Thus, it is not surprising that the district courts do ignore the evidence submitted on motions for summary judgment. The legal standard provides no confidence in summary judgments issued by the United States District Courts in the Seventh Circuit.

II. Background of the Case

In May of 1999, Petitioner Daryl L. Johnson, a black African-American employee, and Josh Goad, a white Caucasian employee, were selected by fellow employees to be promoted to the position of team leaders. App. A, p. 2a.

The employer had posted the position and requested the employees to conduct an election, which they did. *Id.*

After the election, Mr. Johnson and the white selectee complained about racial discrimination which had been directed against Mr. Johnson by some employees. *Id.* Shortly after Mr. Johnson and the white selectee complained about the race discrimination against Mr. Johnson, the employer announced that it was rescinding the positions of team leader to which the two had been elected. *Id.*

Mr. Johnson testified in both his deposition and in his affidavit to his personal observation that the white selectee was later promoted to a team leader position in the Fall of 1999. *Id.* In the statement of facts submitted to the court both in support and in opposition to the motion for summary judgment, the defendant admitted for purposes of the motion that the white selectee was promoted in the Fall of 1999 to the team leader position and Mr. Johnson was not promoted. App. F, App. G.

The white selectee's employment record as of November 11, 1999 listed the white selectee as a production associate, but the Production Manager also wrote on his evaluation as follows:

> Josh is very knowledgable (sic) of most all product lines. I depend on him daily to assist in problem product areas.
>
> If Josh desires, he should be considered as leadership material.

Exhibit G, Meridian's Reply Brief In Support of Motion For Summary Judgment, Record Doc. 56. The Team

Leader position was the position below the Production Manager.

In the face of the testimony and the record of the employer that the white selectee was assisting the Production Manager in problem areas, Meridian admitted for purposes of the motion for summary judgment the fact that the white selectee was given the job of Team Leader. Respondent Meridian stated as follows:

> 102. In the Fall of 1999, Josh Goad was given the job of Team Leader, but Daryl Johnson was not. Johnson Aff. ¶ 35.
>
> ***Meridian's Response:*** **Solely for the purpose of this motion, Meridian will assume this fact exists without controversy.**

App. F (emphasis in original). Meridian also made the same admission in Fact Number 195. App. F. At the next opportunity after the admission, which was the surreply brief in opposition to the motion for summary judgment, Daryl Johnson cited both Fact No. 102 and Fact No. 195 to the district court for the fact that Josh Goad, who did not continue to complain about race discrimination to management, was promoted to team leader in the Fall of 1999. App. H.

The district court ignored the fact. The Court of Appeals stated as the legal standard that district courts need not scour every inch of the record before entering summary judgment. App. A, p. 9a. The fact which was ignored by the district court and which the court of appeals stated could be ignored was the crucial fact in the decision of the court of appeals. App. A., pp. 9a, 11a, 13a,

14a. That fact was repeatedly cited by the court of appeals as being crucial to its decision. *Id.*

REASONS FOR GRANTING THE WRIT

I. Review Is Warranted Because The Decision Is In Direct Conflict With The Court's Decision Of *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

The decision in this case and the standard of review which it has repeatedly assured district courts to follow is in direct conflict with the Court's decision of *Reeves v. Sanderson Plumbing Products, Inc.* as stated above in the discussion and quotation of those decisions. Furthermore, the reasoning of the Seventh Circuit provides no reason to follow its standard, instead of the Court's standard. Additionally, the Seventh Circuit standard undermines the integrity of summary judgments and the implementation of the other decisions of this Court.

II. The Reasoning Of The Decision For Refusing To Review All Of The Evidence On A Motion For Summary Judgment Is Erroneous And Contrary To Other Circuits.

The Seventh Circuit's "need not scour the record" language appears to have first been used in a decision in which the evidence in issue was not even "in the record." *Herman v. City of Chicago*, 870 F.2d 400, 404 (7th Cir. 1989). The *Herman* decision stated as follows:

> Once a party files a motion for summary judgment showing within its four corners entitlement to prevail, judgment must be entered

> "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). See also, e.g. *LHLC Corp. v. Cluett, Peabody & Co.*, 842 F.2d 928, 935-36 (7th Cir. 1988); *Beard v. Whitley*, 840 F.2d 405, 410 (7th Cir. 1988). A district court need not scour the record to make the case of a party who does nothing. Indeed, under the rules of the Northern District of Illinois, depositions and other materials are not in the record until introduced by the party. The materials Gubbins now says the district judge should have hunted up were not in the record then and are not there now. *Henn v. National Geographic Society*, 819 F.2d 824, 831 (7th Cir. 1987).

870 F.2d at 404. The first statement about district courts not scouring the record was made without any citation to authority and was made in a case in which the evidence was not even in the record.

The "need not scour the record" language was then quoted and cited as authority in later decisions for the proposition that the district courts "need not scour the record" before entering summary judgment. *Petru v. City of Berwyn*, 872 F.2d 1359, 1363 (7th Cir. 1989). In *Brasic v. Heinemann's Inc.*, 121 F.3d 281, 286 (7th Cir. 1997), the Seventh Circuit stated that the court of appeals was not required to scour the record, but nevertheless, the court of appeals stated that it had looked at "some of the evidence Brasic claims would have demonstrated that Heinemann's legitimate business reason was pretextual." In *Uhl v. Zalk Josephs Fabricators, Inc.*, 121 F.3d 1133, 1135 (7th Cir. 1997) the Seventh Circuit stated that the district court

was not required to sift through every transcript the non-movant filed to find testimony to back up his case.

The decision of *L.S. Heath & Son, Inc. v. AT&T Information Systems, Inc.*, 9 F.3d 561, 567 (7th Cir. 1993) reviewed decisions from the Ninth and Sixth Circuits which stated that it is the obligation of the non-moving party to present evidence indicating that there is a genuine issue of fact. *Schneider v. TRW, Inc.*, 938 F.2d 986, 991 n. 2 (9th Cir. 1991); *Inter-royal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989), *cert. denied*, 494 U.S. 1091, 110 S.Ct. 1839, 108 L.Ed.2d 967 (1990). However, the Seventh Circuit in *L.S. Heath* jumped from the standard that the non-moving party must present evidence to the standard that "a district court need not scour the record to determine whether there exists a genuine issue of fact to preclude summary judgment." *L.S. Heath*, 9 F.2d at 567. It is the non-moving party's burden to present evidence to refute the moving party's evidence of no issue of material fact. However, once that record is made on the motion for summary judgment, it is the duty of the court to review (or scour as the Seventh Circuit says) all of the evidence in the record. *Reeves*, 530 U.S. at 150. The Seventh Circuit has jumped from a lawful standard to a patently unlawful standard.

The colorful but unfortunate phrase "need not scour the record" has been used repeatedly by the Seventh Circuit to discourage review of the record submitted on a motion for summary judgment to the point that it now assures district courts that they may ignore even admissions of the parties which are stated in the statements of facts of both parties in the pleadings filed on the motion for summary judgment. App. A, p. 9a-10a; App. F, App. G.

The standard has now been used to state that the district courts may scour part of the record, but not scour every inch of the record, specifically the admissions of the movant. *Id.* The admissions are the easiest evidence to determine. If the district courts cannot determine the movant's admissions on a motion for summary judgment, the courts are certainly not able to determine the disputed issues of fact.

The Seventh Circuit has used other colorful phrases to say that neither appellate courts nor district courts are obligated to "scour the record looking for factual disputes." *Greer v. Bd. of Educ.*, 267 F.3d 723, 727 (7th Cir. 2001) ("[A] lawsuit is not a game of hunt the peanut.") If neither the district courts nor the appellate courts review the record, then no court considers all of the evidence before summary judgments are entered. This is an important reason for the conduct of trials where the judge and jury at least hear and see all of the evidence. When the district courts are not required to review all of the record on a motion for summary judgment, and not even the admissions of the movant, then summary judgments provide little benefit.

The Seventh Circuit is the only circuit known to use the derisive phrase "scour the record" to describe the district court's review of the record or to state that the district court need not scour or review the record filed on the motion for summary judgment. While the other circuits require the non-moving party to rebut a movant's evidence that there is no genuine issue of material fact, no other circuit has been found to state that district courts need not review or scour the record on the motion before entering summary judgment.

The Fifth Circuit has stated that when the district court fails to state the basis for the denial of summary judgment, the court of appeals itself may scour the record and determine what facts the plaintiff may be able to prove at trial and proceed to resolve the legal issues, or remand so that the trial court can clarify the order. *Thompson v. Upshur County, TX*, 245 F.3d 447, 456 (5th Cir. 2001) and decisions cited therein. In the *Thompson* case, the court of appeals proceeded to scour the record. *Id.* In contrast, the Seventh Circuit Court of Appeals has repeatedly assured the district courts that even they as trial courts need not scour the record for factual disputes before entering summary judgment. App. A, p. 9a-10a.

III. Review Is Also Warranted To Resolve The Confusion Among The Lower Courts Regarding What Record Must Be Reviewed On A Motion For Summary Judgment.

The confusion may arise from the definition of record. For example, the Seventh Circuit in the *Johnson* decision mentioned the universe of discovery. App. A, p. 9a. The universe of all discovery in a case is not the record of evidence submitted on the motion for summary judgment. The universe of all discovery is certainly not the statements of facts with citations to evidence submitted by the parties in support of and in opposition to the motion for summary judgment. Thus, the Seventh Circuit has jumped from not reviewing all discovery in the case to not reviewing the statements of facts submitted by the parties on the motion for summary judgment which contain admissions for the purpose of the motion. The jump has occurred under the too general Seventh Circuit standard that

district courts "are not required to scour every inch of the record." *Id.*

IV. Review Of The Decision Is Also Warranted In Order To Preserve The Integrity Of Motions For Summary Judgment.

The Seventh Circuit recognizes that the rules of the district courts may structure the summary judgment process, but then the Seventh Circuit ignores the admissions of fact in the statements of fact submitted by the parties as part of that very process. App. A, p. 9a; App. E-G. The Seventh Circuit reasons that the district judge may not have known that the admissions were present. App. A, p. 10a. The only way that the district court would not have known of the admissions in the statements of facts of the parties filed for the motion for summary judgment is for the district court not to read the statements of facts filed for the motion for summary judgment. But not reading the facts and admissions filed for the motion is permitted under the Seventh Circuit's standard that "the district courts are not required to scour every inch of the record." The district courts in the Seventh Circuit are simply not required to review all of the record on the motion for summary judgment.

The Seventh Circuit has allowed district courts to strictly apply the local rules for summary judgment procedures in favor of summary judgment movants, which are usually organizations. *Greer, supra*; *Bordelon v. Chicago School Reform Board of Trustees*, 233 F.3d 524, 527 (7th Cir. 2000); *Elwell v. Dobucki*, 224 F.3d 638, 639 (7th Cir. 2000); *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 921-922 (7th Cir. 1994). However, when it comes to

evidence of the non-movant, which is usually an individual, the Seventh Circuit has stated that the district courts need not review every inch of the record, even written admissions of the movant submitted by both parties on the motion for summary judgment. App. A, p. 9a-10a.

Instead of simply recognizing the admission of fact of the promotion of the white selectee, for purposes of the motion for summary judgment, the Seventh Circuit engaged in speculation about the reason for the admission and the credibility of witnesses, both of which are improper on a motion for summary judgment.

The employer Meridian did not claim in the district court that any admission was an error, but on appeal, the court of appeals at argument "pressed" Meridian for the motive behind the admission. App. A, p. 8a. Meridian then suggested that the admission was an inadvertent mistake. *Id.* Although the court of appeals decision did not "rely" on that claim of mistake, the extended discussion of the motive for the admission provided an improper motive for the decision of the court of appeals. Even if district courts and courts of appeal were allowed to consider on a motion for summary judgment different motives for admissions, which they are not, the courts are not allowed to choose between competing inferences on a motion for summary judgment. *Reeves,* 350 U.S. at 150. Furthermore, the most reasonable inference to be drawn as to the motive for the admission only for purposes of the motion for summary judgment was the conflicting evidence.

The Seventh Circuit also went behind the admission to discuss the credibility of Mr. Johnson who had worked at the location for several years and who had been an excellent employee. App. A, pp. 2a, 9a. Mr. Johnson had

been promoted to team leader at the same time as the white selectee, and he observed the white selectee doing the job of team leader later in the Fall of 1999. Even though Mr. Johnson was an excellent employee and was in a position to personally observe the white selectee, the Seventh Circuit did not give credit to the testimony of Mr. Johnson. Instead, the Seventh Circuit credited the testimony of the Corporate Director of Human Resources whose short affidavit did not even claim to have any personal knowledge or basis for his statements. Record Doc. 54, Affidavit of Keith Kniepkamp.

The Seventh Circuit also stated that a number of questions existed about the facts. App. A, p. 14a. In spite of the questions of fact, the Seventh Circuit affirmed the summary judgment.

The Seventh Circuit opinion implies that district courts cannot handle the paperwork involved in a motion for summary judgment and cannot be expected to review all of the evidence in the record as required by the Supreme Court. Petitioner agrees with the suggestion of the Seventh Circuit that summary judgment be simplified. That simplification is not to ignore parts of the evidence in the record on the motion. The first simplification is to follow the instructions of the Court not to disregard admissions in the record, not to weight the evidence, not to get involved in the credibility of witnesses, not to get involved in speculating about reasons why admissions were made, and not to suggest more discovery and more questions to be answered on the motion for summary judgment.

Secondly, district courts have implemented procedures for the admission and denial of specific facts in statements

of fact. If the district courts ignore their own local rules and ignore the facts which are admitted, the work of the district courts becomes more complicated. The Seventh Circuit's standard that the district courts need not review even the admitted facts which are filed in the statements of fact required by the local rules to be filed with the motion makes the job of the district court even harder. Petitioner agrees with the Seventh Circuit's sympathy for the district courts, but the beginning of the solution lies in following the instructions of the Supreme Court and the rules.

The biggest abuses of the motion for summary judgment are the attempts, like the one in this case, to try the case on a motion summary judgment. Summary judgment is proper only when the facts on an issue are undisputed and that issue can be decided by the district court as a matter of law. Rule 56(c). Instead of following the rule, the district courts are clogged with movants trying to raise every issue in the case, ignoring the principle that the facts for the motion must be undisputed, ignoring the principle that the evidence must be viewed in the light most favorable to the non-movant, and trying to try the whole case on summary judgment.

The Court cautioned against such abuses, stating as follows:

> Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits.

Anderson v. Liberty Lobby, Inc., 477 U.S. at 242. Lawyers seem to be able to abuse any process, having abused the

processes for discovery and experts. We have now abused motions for summary judgment and clogged the courts. We need to get back to the basic principles of law on motions for summary judgment. The first step for the courts is to have a standard of review that the evidence on the motion for summary judgment cannot be ignored, especially the admissions filed on the motion.

The Court in *Desert Palace, Inc. v. Costa,* ___ U.S. ___, 123 S.Ct. 2148, 2154 (2003) emphasized the importance of circumstantial evidence in proving employment discrimination cases as well as proving criminal cases. However, if the court of appeals is allowed to maintain a standard of review assuring district courts that they are not required to scour every inch of the record on a motion for summary judgment, even to the point that they may ignore admissions of the parties which are filed for the motion for summary judgment, then the other decisions of the Court have no effect.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the judgment should be vacated in a summary disposition and the case remanded to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

for the Seventh Circuit

No. 02-1749

DARYL L. JOHNSON,

Plaintiff-Appellant,

v.

CAMBRIDGE INDUSTRIES, INCORPORATED and MERIDIAN AUTOMOTIVE SYSTEMS, INCORPORATED,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. IP00-1540-C-B/S – **Sarah Evans Barker**, *Judge.*

ARGUED SEPTEMBER 19, 2002 – DECIDED APRIL 9, 2003

Before CUDAHY, DIANE P. WOOD, and WILLIAMS, *Circuit Judges.*

DIANE P. WOOD, *Circuit Judge.* Not every genuine difficulty on the job amounts to impermissible discrimination in violation of federal statutes. Instead, distinctions like the difference between an "adverse employment action" and lesser problems, or between an employee's actual performance and the employer's perception of that performance, abound. When Daryl Johnson sued his

current employer, Meridian Automotive Systems, Inc., as well as its predecessor Cambridge Industries, Inc., alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, the district court was required as a matter of law to observe these subtle distinctions when it ruled on Meridian's motion for summary judgment. The district court was also entitled to rely on the materials each party cited as a basis for its decision. We conclude that the court correctly determined that Johnson did not produce enough evidence to warrant a trial, although some of our reasons for reaching this decision are different from the district court's. We therefore affirm the judgment of the district court.

I

Since 1996, Johnson, an African-American male, has worked as a production associate building fiberglass automotive replacement parts for Cambridge Industries, now owned by Meridian. Johnson has been an outstanding employee with an excellent history of performance evaluations and a company-wide reputation for high quality work. This generally favorable assessment of Johnson is tarnished only by a single write-up, which was mistakenly given to Johnson on two separate occasions. The write-up documents various employment-related problems on Johnson's part over an eight-month period.

When Cambridge advertised an opening for two team leaders in May 1999, Johnson and white co-worker Josh Goad applied for and were elected to these positions by their colleagues. That positive event was clouded, however, by two separate racist remarks made by co-workers Ross Springman and Brian Durham that came to Johnson's

attention more or less contemporaneously. Specifically, when Springman was asked why he was not going to run for the team leader position, he proclaimed that there was no need to compete for that job since it was a foregone conclusion who would receive the position. Pressed by a co-worker to explain his comment, Springman apparently said, "Eenie, meenie, minie, moe, pick a nigger by his toe," in reference to the fact that Johnson was a candidate for the position. (In any event, Goad reported that he overheard Springman's comment to this effect.) In an unrelated incident, Durham told co-worker Travis Irvine that he did not know why Irvine would "want that one-eyed nigger over here." The comment could only have referred to Johnson, who lost the sight in one of his eyes as a child. Neither Springman nor Durham was a supervisor of Johnson, and both received some form of management censure. Springman was suspended for three days (and served at least one day of his suspension), and Durham's employment was terminated, although the record does not establish whether or not he left Cambridge voluntarily, and whether his departure was in response to his racist remark.

Shortly after Johnson and Goad complained to management about these racist remarks, the company announced that it was rescinding altogether the positions of team leader to which the two had been elected. When asked by Johnson to explain, Acting Plant Manager Ron Szydlowski told him, "[I]t came down from corporate that there will be no other team leader positions, just the ones that are already appointed previously." Johnson asserted in his deposition and affidavit that in the fall of 1999, Goad was put in a team leader position, but Johnson was not. He did not call any other evidence of such a promotion

to the district court's attention, however, which led to problems we discuss below.

Other facts pertinent to Johnson's appeal relate to both his race discrimination and retaliation charges. For example, on October 15, 1999, Johnson injured his back on the job and went to a local hospital emergency room for treatment. The doctor prescribed painkillers and recommended a lumbar back support brace for him. Nonetheless, upon his return to work a few days later, he was assigned to work that aggravated his injury. The company would not permit him to work while taking certain prescription medications. Worse, despite the promises from company officials that he would receive the back brace through a company program, he did not get the brace until he produced a doctor's prescription and told the company his waist size. Johnson believed that this treatment was in retaliation for his complaints about racial discrimination in the workplace. Likewise, Johnson asserts that he was assigned harder tasks than his white co-workers and was left to perform these tasks alone, which, because of the racial lines these assignments reflected, also evidenced a discriminatory workplace. Finally, Johnson offers evidence of various encounters with Cambridge's management as proof that he was the victim of discrimination and impermissibly retaliated against for engaging in protected conduct. These encounters include (among other things) being told by a supervisor to wear safety goggles; receiving a warning about alleged violations of Cambridge's vacation policy; receiving a written notification of nine instances of unsatisfactory job performances that spanned a period of eight months; and being threatened with termination for insubordination.

Johnson filed his first charge with the Equal Employment Opportunity Commission (EEOC) on October 18, 1999. A week later he filed a second charge with the EEOC alleging that Cambridge retaliated against him for filing the first charge. Curiously, neither complaint alleges that Johnson was denied the promotion to team leader for impermissible or discriminatory reasons. The EEOC issued right-to-sue letters in both cases, and Johnson subsequently filed this lawsuit against both Meridian and Cambridge on October 4, 2000. (Johnson's claims against Cambridge are stayed because Cambridge in the meantime has filed for bankruptcy, and thus it is protected by the automatic stay. This does not affect our substantive analysis, however, and procedurally the case is properly here because the district court entered a judgment pursuant to FED. R. CIV. P. 54(b) with respect to Meridian. Because all of the conduct at issue occurred while Johnson was employed by Cambridge, we sometimes refer to both defendants as Cambridge.)

II

Our review of the district court's decision to grant summary judgment for Meridian is *de novo. Gordon v. United Airlines,* 246 F.3d 878, 885 (7th Cir. 2001). In deciding the appeal, we draw our own conclusions of law and fact from the record and will uphold summary judgment in Meridian's favor only if there is no genuine issue of material fact and Meridian is entitled to judgment as a matter of law. *Id.* See also FED. R. CIV. P. 56(c).

It is now well established that a plaintiff may show that she was the victim of discrimination or impermissible retaliation in the workplace either by providing direct

evidence of discrimination or by proceeding under the indirect, burden-shifting method of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). See *Wallace v. SMC Pneumatics, Inc.,* 103 F.3d 1394, 1397 (7th Cir. 1997). In spite of the alleged racist comments from certain co-workers, Johnson lacks direct evidence of race discrimination or retaliation and thus is proceeding under the *McDonnell Douglas* burden-shifting method.

The *McDonnell Douglas* approach requires a plaintiff first to establish certain *prima facie* elements for either race discrimination or retaliation. See *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 142 (2000). Once this is done, through competent evidence, the burden of production shifts to the defendant to offer a permissible, noninvidious reason for the alleged discrimination. *Id.* If the defendant meets this production burden, the plaintiff may then rebut that evidence by showing that the employer's reasons are a pretext for discrimination or that the decision was tainted by impermissible, race-based motives. *Id.* at 143; see also *Gordon,* 246 F.3d at 886. " 'The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.' " *Reeves,* 530 U.S. at 143 (quoting *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253 (1981)).

A. Failure to Promote Claims

As the district court noted, Johnson's complaint that he was denied the team leader promotion can be read to state a claim of either race discrimination or retaliation. Therefore we analyze it under both theories. To establish a *prima facie* case for race discrimination, Johnson must

show that he belongs to a protected class, that he was performing his job at Cambridge to his employer's satisfaction, that he suffered an adverse employment action, and that a similarly-situated employee who was not a member of a protected class was treated more favorably by Cambridge. *Stalter v. Wal-Mart Stores, Inc.*, 195 F.3d 285, 289 (7th Cir. 1999). The *prima facie* case for a retaliation claim requires the plaintiff to show "that (1) after lodging a complaint about discrimination, (2) only he, and not any otherwise similarly situated employee who did not complain, was (3) subjected to an adverse employment action even though (4) he was performing his job in a satisfactory manner." *Stone v. City of Indianapolis Pub. Utils. Div.*, 281 F.3d 640, 642 (7th Cir. 2002). See also *Hilt-Dyson v. City of Chicago*, 282 F.3d 456, 465 (7th Cir. 2002). *Stone* clarifies that to establish a *prima facie* case of retaliation, an employee need not present proof of a " 'causal link' between the protected expression in which the plaintiff engaged (as by filing a complaint about an unlawful act by his employer) and the adverse employment action of which he is complaining." *Stone*, 281 F.3d at 642; *Haywood v. Lucent Techs. Inc.*, No. 01-4092, 2003 WL 1400496, *5 (7th Cir. Mar. 20, 2003).

Before examining Johnson's failure-to-promote claim, we must clarify whether we are talking about events limited to the May 1999 abolition of the team leader position, or whether there is evidence in this record that supports the claim Johnson now emphasizes, which is that the company's promotion decisions must be assessed under the broader time frame that includes Goad's alleged fall 1999 promotion. Meridian argues first that Johnson waived this point by admitting in his deposition that the only denial of an employment opportunity he was complaining

about was the loss of the team leader position in May 1999. D. Johnson Deposition at 147. We do not find the comment, which has no reference to the date on the page to which Meridian refers us, to be so clear. The more important question, however, is whether Johnson met his burden of directing the district court's attention to admissible evidence that Goad was later promoted.

Johnson's own deposition and affidavit make it quite clear that he sees this as a case where both men applied for the team leader position, that both temporarily lost it because of their complaints about discrimination, but that later on only Goad received the promotion. (Johnson speculates this happened because his was the louder voice in the earlier complaints.) In addition, Johnson now asserts, Meridian admitted in a filing to the court that Goad was indeed subsequently given the team leader job, and that this amounted to a promotion. In Meridian's reply to Johnson's Statement of Additional Material Facts pursuant to Local Rule 56.1, ¶ 102, the company responded to Johnson's statement that "In the Fall of 1999, Josh Goad was given the job of Team Leader but Daryl Johnson was not" as follows: "Solely for the purpose of this motion, Meridian will assume this fact exists without controversy." When pressed at oral argument before this court to explain why the company answered this question as it did rather than with a denial, the best that counsel for Meridian could do was to suggest that the company's reply had been an inadvertent mistake. (There is some plausibility to this claim, given the fact that the statement occurs in the very same document that had Meridian's replies to Johnson's responses to its own Statement of Material Facts, and in those replies it unequivocally stated that Goad "was not made a team leader at any time

between May 1999 and the date of his resignation." Reply to ¶ 33. We do not rely on any such inadvertence to excuse the company's willingness to assume this fact for purposes of the summary judgment motion, however, given the rule that facts are to be taken in the light most favorable to the non-moving party at summary judgment.)

If Johnson had made any use of that statement in his filings with the district court in response to the summary judgment motion, this would be a different case. But he did not. Instead, he supported his assertion that Goad received the later promotion only with a reference to his own deposition and to his own affidavit. He did not indicate why or how he had personal knowledge about Goad's employment status with the company. In fact, Meridian specifically directed the court's attention to the affidavit of Keith Kniepkamp, who was the Corporate Director of Human Resources for Meridian. Kniepkamp stated that Goad was a production associate until he quit his employment at Cambridge during the summer of 2000, and that Goad was never promoted to team leader during the time of his employment at Cambridge. Thus, the district court had before it Johnson's unsupported assertion that Goad received the promotion while he was still with the company, in the fall of 1999, and the Human Resources Director's affidavit to the contrary.

While it may seem unfair to hold Johnson to the evidence he cited to the district court, it is not. Discovery is notorious for producing far more material than the parties will ultimately use. We have repeatedly assured the district courts that they are not required to scour every inch of the record for evidence that is potentially relevant to the summary judgment motion before them. See, *e.g.*, *Greer v. Board of Educ.*, 267 F.3d 723, 727 (7th Cir. 2001);

Little v. Cox's Supermarkets, 71 F.3d 637, 641 (7th Cir. 1995) (citing *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986)). The rules of each district court structuring the summary-judgment process cannot serve their function if parties can later go to the court of appeals and secure a reversal based on evidence the district judge may not have known was present. In our view, that is what we would be doing if we now relied on the qualified admission in ¶ 102 of Meridian's statement.

This means that the question before us is whether the evidence Johnson properly presented to the district court can support either his race discrimination claim or his retaliation claim. We turn first to an element of the *prima facie* case that is necessary for both: whether Johnson can point to a similarly situated co-worker who was treated more favorably either because she was not a member of a protected class or because she did not engage in protected conduct. The district court concluded that the answer was no, noting that both Johnson (a member of a protected class) and Goad (a white employee who is not a member of a protected class) were elected to the team leader position, then complained of racist remarks in the workplace, and finally were denied their elected positions. This, the judge concluded, was fatal to both theories Johnson was pursuing.

The court gave only brief consideration to Johnson's broader claim. In a footnote, it commented that "Mr. Johnson believes (without supplying any evidence of the fact) that Mr. Goad was promoted to team leader at some point in May 1999. We find Cambridge's evidence that Mr. Goad was *never* promoted to team leader conclusive against Mr. Johnson's mere belief." As far as Johnson's presentations before the district court were concerned, this

observation was correct. It is immaterial that there might have been other evidence in the record – the ¶ 102 statement, specifically (which incidentally did not take the form of an admission under Rule 36 of the Federal Rules of Civil Procedure, but was only evidentiary in nature) – that would have changed matters. Johnson did not call ¶ 102 to the court's attention. This means that neither the court nor Meridian was alerted to its possible significance. From Meridian's standpoint, it also means that Meridian had no opportunity to make any appropriate motions that might have clarified the matter then and there. Without competent evidence of Goad's later promotion, Johnson's case on both the race discrimination and the retaliation theories collapses.

If, however, one were to give Johnson every benefit of the doubt and assume that the district court should have considered the case on the assumption that Meridian had accepted for purposes of the motion the fact that Goad was later promoted (which, to repeat, is not our view), we would turn to the remaining aspects of Johnson's *prima facie* race discrimination case. Meridian is not, for present purposes, disputing that Johnson is a member of a protected class or that he performed his job to Cambridge's satisfaction. The remaining issue that is relevant for the *prima facie* case is whether Johnson can show that he suffered an adverse employment action. The district court resolved in Johnson's favor the question whether the team leader position constitutes a promotion after crediting Johnson's testimony that the position is accompanied by slightly higher pay. Counsel for Meridian reluctantly conceded this point at oral argument; therefore, we too find that the team leader position constitutes a promotion and that if Johnson was denied this position he suffered

an adverse employment action. See, *e.g., Hilt-Dyson,* 282 F.3d at 465-66 (materially adverse employment action may be demonstrated by a pay decrease).

Meridian had tried to avoid the implications of its concession that team leaders receive a salary increase by drawing our attention to the fact that there is no evidence that Goad received a pay increase after he was allegedly promoted. After oral argument it called to our attention recent decisions of the Courts of Appeals for the District of Columbia and Sixth Circuit, which held that adverse employment actions within the meaning of Title VII cannot be established by showing job reassignments that carry the loss of prestige, see *Forkkio v. Powell,* 306 F.3d 1127, 1130-31 (D.C. Cir. 2002), or involve more physically demanding work, see *White v. Burlington N. & Santa Fe Ry. Co.,* 310 F.3d 443, 450 (6th Cir. 2002). But those cases are unhelpful for our purposes, precisely because (unlike the defendants in *Forkkio* and *White)* Meridian concedes that the team leader position is a higher paying position, and thus a promotion. At this stage it is enough that there is some evidence indicating that team leader positions come with a pay increase. That means that the denial of an opportunity to move to the position, unlike the mere denial of a lateral transfer, constitutes a materially adverse employment action. *Hilt-Dyson,* 282 F.3d at 465-66. Accordingly, if the evidence about Goad's alleged later promotion were properly in the case, we would find that Johnson has established his *prima facie* case.

At this point, the burden of production would shift to Meridian to supply a non-discriminatory, non-invidious reason for promoting Goad instead of Johnson. *Reeves,* 530 U.S. at 143. Once again, Johnson's biggest problem is with the way he presented the case at the district court. By

failing to show the court that he had evidence of Goad's ultimate promotion, he lost the opportunity to broaden the court's inquiry beyond the events of May 1999. And as to the May events, the company was ready with a legitimate, nondiscriminatory reason for its actions. As Johnson himself testified in his deposition, then-Acting Plant Manager Ron Szydlowski told him that "[I]t came down from corporate that there will be no other team leader positions, just the ones that are already appointed previously." In short, the company claimed that its decision was a general structural one, made at higher corporate levels, not one personal to the affected individuals. Both because it believed that Johnson's claim was limited to the events of May 1999, and because it believed that any later promotion was not in the case, the company did not explicitly address any reason justifying Goad's later promotion. (Indeed, had this been squarely in front of the court, it is overwhelmingly likely that Meridian would have reiterated its evidence that no such promotion occurred.)

With an admissible, non-discriminatory reason for the decision not to promote either Johnson or Goad in May 1999 on the table, the burden shifted back to Johnson to present legally sufficient evidence that would support an inference that Cambridge really was acting out of an invidious purpose. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 507-08 (1993); *Jones v. Union Pacific R.R. Co.,* 302 F.3d 735, 742 (7th Cir. 2002). We agree with the district court that because the initial decision not to promote Johnson and Goad to team leader was made at the corporate rather than facility level, there was simply no evidence showing that Meridian's explanation was pretextual. Nothing at that stage shows race discrimination, given the equal treatment of the two men. (This is an

alternative ground for agreeing with the district court's decision with respect to the May 1999 promotion as an isolated event.) Similarly, and alternatively to our earlier discussion of the retaliation claims, there was no indication that the corporate actors who made this decision were aware of Johnson's complaints of race discrimination. See *Maarouf v. Walker Mfg. Co.*, 210 F.3d 750, 754-55 (7th Cir. 2000) (discriminatory intent must influence ultimate decisionmaker).

If the broader claim were properly in the case, it is possible that Johnson might have created a jury issue on it. The problem, once again, is that the procedural failure to call the ¶ 102 statement to the court's attention affected the way the case was developed. A number of questions exist, which might have been answered through the discovery materials available to both parties. Most critically, Johnson would have had to come forward with more than his own speculation that Goad really did receive the position. Beyond that, it would be important to know whether or not Johnson knew about the second team leader opening in the fall; if he did, whether he applied for it or otherwise made his continuing interest known. From Meridian's side, one would like to know what did happen to Goad in the interim that might have caused the confusion about his alleged promotion. If it did designate Goad as a team leader, how and why did that happen? Finally, we would need contemporaneous evidence about Johnson's performance at the later time, given the fact that discrimination must be assessed at the time a company acts. Just because a person is an excellent employee at one point does not assure that he or she is the right person for a promotion at another point months later. But, because the crucial statement in ¶ 102 was not brought to the

district court's attention, none of this was developed. On the record as it stands, we must conclude that Johnson has failed to show that Meridian's reasons for acting as it did were pretextual.

B. Miscellaneous Claims of Race Discrimination

In addition to his claims stemming from the passed-over promotion, Johnson also complains that he was singled out for unfavorable treatment by Cambridge because of his race. This charge is backed up with allegations that Johnson was given harder tasks at work and made to perform them alone (tasks that white co-workers always undertook as a group), and that he was told to wear safety goggles even though white co-workers were not given the same admonition.

We need not belabor Johnson's race discrimination claims beyond briefly noting why he cannot make out his *prima facie* case. Simply put, nothing about which Johnson is complaining amounts to an adverse employment action. The definition of an adverse employment action is generous, but it is still subject to certain limitations. See *Herrnreiter v. Chicago Housing Auth.*, 315 F.3d 742, 744 (7th Cir. 2002); *Haugerud v. Amery School Dist.* 259 F.3d 678, 691 (7th Cir. 2001). At the very least, Johnson must show some quantitative or qualitative change in the terms or conditions of his employment that is more than a mere subjective preference. *Herrnreiter,* 315 F.3d at 744-45. Being made to wear safety goggles does not meet this standard. Nor does Johnson's allegation that he was given harder work assignments, under the circumstances he describes.

In his deposition testimony, Johnson boasted about his superior capabilities as an explanation for why he got harder work assignments. Meridian pointed to this statement as a legitimate, non-discriminatory reason for its actions: it gives more demanding jobs to better employees, regardless of race. This non-race-based explanation puts the burden back on Johnson to prove that Meridian treated him differently because of his race. As we have said before, summary judgment "is the 'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events." *Schacht v. Wisconsin Dep't of Corr.*, 175 F.3d 497, 504 (7th Cir. 1999). Johnson offers no additional evidence from which it may be inferred that he was made to perform harder jobs because of his race and not his capabilities. Therefore summary judgment in Meridian's favor was proper.

C. Second Retaliation Claim

Finally, we turn to Johnson's claim that Cambridge retaliated against him a second time following his complaints to the EEOC. The alleged retaliatory acts included the company's refusal to provide him a back brace following the back injury that he sustained while working; the decision not to allow him to work while taking prescription medications for that injury; and the Formal Notifications of Unsatisfactory Conduct that Johnson received.

The district court resolved this second retaliation argument against Johnson, finding that he failed to make out the *prima facie* case for retaliation both because none of the alleged retaliatory acts (alone or together) constituted an adverse employment action, and because there

was no evidence of a causal link between the protected conduct and the retaliatory act. As we have already explained, the law of this Circuit no longer requires a causal link to make out a *prima facie* case for impermissible retaliation. *Stone,* 281 F.3d at 642. But even with that hurdle cleared, Johnson still cannot make out his *prima facie* case unless he can show that the denial of the back brace, refusal to allow him to work while on pain medications, or the write-up constituted adverse employment actions.

As we noted above, the range of employer conduct that constitutes an adverse employment action is broad, but not unlimited. *Haugerud,* 259 F.3d at 691. In *Crady v. Liberty Nat'l Bank & Trust Co.,* 993 F.2d 132, 136 (7th Cir. 1993), the court gave a list of materially adverse actions that an employer might take, including, of course, termination of employment, "a less distinguished title, a material loss of benefits, significantly diminished material responsibilities," *etc.* These actions are all similar to the extent that they effect a quantitative or qualitative change in the terms or conditions of employment. *Haugerud,* 259 F.3d at 691. In the retaliation context, we have explained that the adverse action or harm that an employee suffers will not always be employment-related. See *Herrnreiter,* 315 F.3d at 745-46 (citing *McDonnell v. Cisneros,* 84 F.3d 256, 258-59 (7th Cir. 1996)). Nonetheless, the employee must complain of some action on the employer's part that causes her to suffer a real harm. *Cf. Schobert v. Illinois Dep't of Transp.,* 304 F.3d 725, 731 (7th Cir. 2002) ("Every tort, whether it be one derived from common law or a statutory tort like Title VII, requires a showing of harm.").

Even under the more generous standard that governs retaliation claims, we do not believe that Johnson has

suffered the necessary harm. The denial of a back brace and the enforcement of a pre-existing rule that employees may not work while taking certain prescription medications are not the type of employer actions that our cases label materially adverse. Cambridge's decision to put a laundry list of complaints aired about Johnson's work into writing looks more troublesome, but it cannot support this claim either. Our law is clear that without more, a performance evaluation of this type does not amount to an adverse employment action. See *Haywood,* 2003 WL 1400496 at *6; *Grube v. Lau Indus., Inc.,* 257 F.3d 723, 729-30 (7th Cir. 2001) ("Unfair reprimands or negative performance evaluations, unaccompanied by some tangible job consequence, do not constitute adverse employment actions."); *Krause v. City of La Crosse,* 246 F.3d 995, 1000 (7th Cir. 2001) (same). Johnson merely alleges that he received the written notification. He made no effort to show how it affected his employment from that time forward. The district court was therefore correct to reject this claim as well.

III

For the foregoing reasons, the judgment of the district court is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DARYL L. JOHNSON,	)	
Plaintiff,	)	
vs.	)	IP 00-1540-C B/S
CAMBRIDGE INDUSTRIES, INC. and MERIDIAN AUTOMOTIVE SYSTEMS, INC.,	)	
Defendant.	)	

ENTRY ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. *Introduction.*

This is an employment discrimination case brought pursuant to Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e et seq. and 1981a. The plaintiff, Daryl Johnson, alleges that his employer, Cambridge Industries,[1] discriminated against him on the basis of his race, tolerated or condoned a racially hostile atmosphere in the work place, and then retaliated against him for filing an EEOC charge complaining about the race discrimination. The case is before us on Cambridge's motion for summary judgment as to all three claims. For the following reasons we GRANT defendant's motion.

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[1] Meridian is Cambridge's successor. After Cambridge filed for bankruptcy, Meridian purchased some of its facilities in July 2000. All of the alleged discriminatory acts took place prior to Meridian's purchase. We refer to the employer throughout as Cambridge.

II. *Statement of Facts.*

All of the facts recited here are either undisputed by the parties or are stated in a light reasonably most favorable to Mr. Johnson.

Mr. Johnson, an African American, began working for Cambridge at its Rushville plant in June of 1996. Cambridge filed for bankruptcy, and in July 2000 Meridian acquired some of Cambridge's facilities. Meridian manufactures automotive parts, as did Cambridge before it. Mr. Johnson remains employed at Meridian as a "production associate" who builds automotive replacement parts. Def. Facts ¶¶ 1-3.[2]

Prior to 1999, Mr. Johnson reported to Production Manager Beverly Harney, an African American. Since then, he has reported to Area Manager Paul Wiley and acting Plant Manager Ronald Szydlowski, both Caucasian. Def. Facts, ¶ 5; Pl. Response, ¶ 5; Pl. Add. Facts, ¶ 75. Eric Williams, an African-American, served as team leader at relevant times. Pl. Add. Facts, ¶ 76. Mr. Johnson alleges that none of the discriminatory and retaliatory incidents that he enumerates occurred before May 1999, when co-employees Ross Springman and Brian Durham made racially derogatory remarks. Def. Facts, ¶ 5 (Pl.Reply).

Mr. Johnson was (and apparently remains) an employee whose work performance management respects. He has had excellent performance reviews and his supervisors have praised his ability not only to perform his own tasks

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[2] We refer to defendant's Statement of Material Facts as "Def. Facts, ¶ ___" throughout this entry. We refer to plaintiff's Statement of Additional Material Facts as "Pl. Add. Facts, ¶ ___."

but also to help train others. Pl. Add. Facts, ¶ 81. In July 1997, Production Manager Beverly Harney stated:

> Daryl is a pleasure to work with. Daryl takes the initiative to make things happen on every job he's been assigned to. If there is down time on a job, Daryl is scheduled to run, he always find[s] something productive to do. Housekeeping is an area Daryl could improve. Attendence [sic] is great. You can put Daryl on any job and get results.!!!

Pl. Add. Facts, ¶ 82. In November, 1999, Production Manager Paul Wiley rated his performance as excellent and stated that Mr. Johnson "[k]nows most jobs in the shop, very good resource on old jobs not ran [sic] frequently." Pl. Add. Facts, ¶ 84. Materials Manager Dave Hittle and Acting Plant Manager Ron Szydlowski told Eric Williams that Daryl Johnson is the best worker. Pl. Add. Facts, ¶ 85.

In May 1999, Cambridge posted openings for two "team leaders." A team leader is a production employee who helps other employees and guides their work performance. A team leader earns a higher hourly wage than similarly-situated production employees, so that being elected team leader was a promotion for a production employee such as Mr. Johnson. Johnson Dep., p. 141; Def. Facts, ¶ 33. Mr. Johnson, among others, applied for the position. Pl. Add. Facts, ¶ 90; Def. Facts, ¶¶ 29, 30. By vote of the production employees, both Mr. Johnson and his co-employee Josh Goad were elected team leaders. Pl. Add. Facts, ¶ 97.

Cambridge corporate personnel, however, rescinded the plan to add two team leaders. It decided to add none,

so that Mr. Johnson and Mr. Goad were deprived of the positions to which they had been elected. Pl. Add. Facts, ¶ 98. Def. Facts, ¶ 31. Mr. Johnson is under the impression that Mr. Goad was later appointed a team leader. Production Area Manager Paul Wiley, who reviewed Mr. Goad's performance, testified that Mr. Goad *never* served as a team leader. Wiley Aff., ¶ 2. That testimony is supported by Mr. Goad's November 1999 employment review, which refers to him as a "production associate" since May 25, 1997, Def. Ex. G, and by the testimony of Human Resources Director Keith Kniepkamp. Kniepkamp. Aff., ¶ 2.

Mr. Johnson's not being appointed team leader is the flash point of this lawsuit. Mr. Johnson characterizes his not receiving the team leader position as a failure to promote or a "taking" of the position. Cambridge characterizes it as a non-action in that the corporation decided not to create the position after initially announcing that it would. Here, we merely note the fact that Mr. Johnson and Mr. Goad did not receive the promotions. We address its legal significance in subpart III-C below.

On October 18, 1999, Mr. Johnson filed an EEOC charge alleging that: (1) Cambridge discriminated against him because of his race by assigning to him the more difficult, heavier jobs; (2) coworker Ross Springman had made a racial remark in May, 1999; and (3) on one occasion Materials Manager Dave Hittle had harassed him by telling him to put on his safety glasses. Def. Facts ¶ 6. Eight days later, on October 26, 1999, Mr. Johnson filed another EEOC charge, this time alleging that Cambridge had retaliated against him for filing his first charge the week before. The retaliation alleged was refusing to give him a back brace and not allowing him to work while he

was taking prescription pain killers and muscle relaxants. Def. Facts ¶ 7.

Mr. Johnson alleges – and it is here uncontested – that he was the subject of two racial remarks,[3] one by co-employee Ross Springman and a second by co-employee Brian Durham. Neither co-employee was a supervisor. Def. Facts, ¶ 11. Mr. Johnson was not present when either of the remarks was made. Def. Facts, ¶¶ 11, 12.

In the first instance, co-employee Ross Springman said that he was not going to be a candidate for the announced team leader positions because it was a foregone conclusion who would be chosen. Asked what he meant, Mr. Springman said: "Eenie, meenie, minie, moe, pick a nigger by his toe," a reference to Mr. Johnson, who was a candidate for team leader. Mr. Johnson later learned about Mr. Springman's comment from co-employee Josh Goad, who heard Mr. Springman make the comment. Def. Facts. ¶¶ 14, 15. Mr. Goad reported Mr. Springman's remark to team leader Eric Williams. Then Mr. Williams, Mr. Goad, and Mr. Johnson reported the remark to Melissa Johnson Edgar who served in the company's Human Resources department. Def. Facts, ¶ 16. Mr. Springman apologized to Mr. Johnson and received a three-day suspension for

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[3] In responses to defendant's statement of material fact, plaintiff admits that he was the subject of two racial comments, but adds: "in addition to other racial remarks." Plaintiff cites plaintiff's deposition exhibit 11 for the proposition that there were "additional racial remarks." The cited exhibit, Mr. Johnson's first EEOC charge, does not support the proposition that there were "additional" racial remarks. Plaintiff expressly testified that the two remarks – one by co-employee Springman, the other by co-employee Durham – were the only two on which he based his complaint. Johnson Dep., p. 103.

making the comment. Def. Facts, ¶ 17. Mr. Johnson alleges that Mr. Springman served only one day of the three-day suspension. Since Cambridge acknowledges the existence of some doubt about the length of the suspension, we conclude that Mr. Springman served only a one-day suspension. Def. Facts, ¶ 17 (Response, Reply). Still, Mr. Johnson testified that he believed Mr. Springman had been "threatened" by management and was scared about losing his job as a result of making the comment. Def. Facts, ¶ 18. Mr. Johnson is unaware of any other derogatory comments that Mr. Springman may have made after this incident. Def. Facts, ¶ 19.

Co-employee Brian Durham also made racial comments. Mr. Johnson learned about Mr. Durham's comments later from co-employee Vicki Ford (who subsequently married Mr. Johnson). Def. Facts, ¶¶ 20, 21. Mr. Durham said to co-employee Travis Irvine: "I don't know why you want that one-eyed nigger over here," a derogatory reference to Mr. Johnson (and the fact that he had lost all vision in his left eye during childhood). Mr. Irvine reported this statement to team leader Eric Williams, and Mr. Irvine and Mr. Williams then reported it to Human Resources. Def. Facts, ¶ 22, 23; Johnson Dep., p. 170. Mr. Durham left Cambridge's employ several days later. Def. Facts, ¶ 24-25. The parties do not resolve the questions of whether his departure was voluntary or involuntary or whether it was related to his derogatory comment.

III. *Discussion.*

A. *The Standard on Summary Judgment*

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A genuine issue of material fact exists if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party on the particular issue. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Eiland v. Trinity Hosp.,* 150 F.3d 747, 750 (7th Cir. 1998).

On a motion for summary judgment, the burden rests on the moving party to demonstrate "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). After the moving party demonstrates the absence of a genuine issue for trial, the responsibility shifts to the non-movant to "go beyond the pleadings" and point to evidence of a genuine factual dispute precluding summary judgment. *Id.* at 322-23, 106 S.Ct. 2548. "If the non-movant does not come forward with evidence that would reasonably permit the finder of fact to find in her favor on a material question, then the court must enter summary judgment against her." *Waldridge v. American Hoechst Corp.,* 24 F.3d 918, 920 (7th Cir. 1994) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 585-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Celotex,* 477 U.S. at 322-24, 106 S.Ct. 2548; *Anderson,* 477 U.S. at 249-52, 106 S.Ct. 2505.

Summary judgment is not a substitute for a trial on the merits, nor is it a vehicle for resolving factual disputes. *Waldridge,* 24 F.3d at 920. Therefore, in considering a motion for summary judgment, we draw all reasonable inferences in favor of the non-movant. *Venters v. City of Delphi,* 123 F.3d 956, 962 (7th Cir. 1997). If genuine doubts remain, and a reasonable fact-finder could find for the party opposing the motion, summary judgment is inappropriate. See *Shields Enters., Inc. v. First Chicago Corp.,* 975 F.2d 1290, 1294 (7th Cir. 1992); *Wolf v. City of Fitchburg,* 870 F.2d 1327, 1330 (7th Cir. 1989). But if it is clear that a plaintiff will be unable to satisfy the legal requirements necessary to establish her case, summary judgment is not only appropriate, but mandated. *See Celotex,* 477 U.S. at 322, 106 S.Ct. 2548; *Waldridge,* 24 F.3d at 920.

B. *Statute of Limitations.*

Defendant argues that Mr. Johnson's lawsuit was untimely because he failed to file his complaint within ninety days after receiving his Right to Sue Notice ("RTS"). Title VII provides that an aggrieved person must bring a lawsuit within ninety days after the EEOC gives notice that it is not bringing an action in its own name. It is well settled that this "giving of notice" language actually means that the individual has *received* notice, so that the filing period does not begin until the individual (or the individual's counsel) actually receives the RTS Notice. *Crown, Cork & Seal Co., Inc. v. Parker,* 462 U.S. 345, 354, 103 S.Ct. 2392, 2398, 76 L.Ed.2d 628 (1983); *Threadgill v. Moore U.S.A., Inc.,* 269 F.3d 848, 850 (7th Cir. 2001); *Saxton v. American Tel. & Tel. Co.,* 10 F.3d 526, 532. n.11 (7th Cir. 1993).

The RTS Notices (one for each of Mr. Johnson's charges) were sent by EEOC on May 18 and July 11, 2000 respectively. Mr. Johnson's complaint was filed on October 4, 2000, 140 days after the first RTS Notice was mailed and eighty-five days after the second was mailed. Manifestly, the complaint was timely with respect to the second RTS. As to the first Notice, we recognize that there was a long interval between EEOC issuing it and the date on which the complaint was filed. We also note Mr. Johnson's lack of precision as to when he received it. But we will not dismiss a complaint on summary judgment on statute of limitations grounds without clear evidence that the limitations period was in fact exceeded.

Since the limitations period begins when the plaintiff *receives* the RTS, we look for persuasive evidence that Mr. Johnson or his lawyer actually received the notice more than ninety days before his complaint was filed. Defendant bears the initial burden of persuasion as to its affirmative defense. *Venters v. City of Delphi,* 123 F.3d 956, 967 (7th Cir. 1997); *Law v. Medco Research, Inc.,* 113 F.3d 781, (7th Cir. 1997). We will not accept defendant's invitation to base a legal decision as to statute of limitations on a credibility determination or on plausible inferences. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether [she] is ruling on a motion for summary judgment or for a directed verdict." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

In sum, on the record before us, there is a genuine issue of material fact as to when Mr. Johnson received his RTS notice, preventing us from being able to say as a matter of law that he filed his complaint untimely.

C. *Mr. Johnson's Failure to Promote Claim.*

At the heart of Mr. Johnson's lawsuit is the fact that he was denied the team leader position in May 1999 after having been elected to it. Asked at his deposition: "So your complaint is that you didn't get the team leader position in May and that was discriminatory?" Mr. Johnson replied: "Yeah." Johnson Dep., p. 108. Although he seeks to challenge this on summary judgment, he testified that this was the only employment opportunity that he was denied. Asked: "Is there anything else you claim was a denial of an employment opportunity other than the team leader position?" Mr. Johnson responded: "That was it." Johnson Dep., p. 147. This testimony was consistent with statements that Mr. Johnson volunteered during the course of his deposition, many of which point to his complaining about the racial comments of Mr. Springman and Mr. Durham which, Mr. Johnson alleges, led to being denied the team leader position. *See, e.g.,* Johnson Dep., pp. 179-181; p. 185 ("The only thing I lost was that team leader position."). Mr. Johnson testified: "Lost the team leader position over it, over everything that you're saying; that's part of the record." Asked, "It really all comes down to the team leader position, doesn't it?" Mr. Johnson responded: "That and the racial remarks, that's where it all started; that's where everything started." Johnson Dep., p. 188. Mr. Johnson's statements are also consistent with the evidence he presents. That is, except for the team leader position, he presents no evidence of another lost employment opportunity.

It is unclear at the summary judgment stage whether Mr. Johnson is alleging that Cambridge's denial of the team leader position was an act of *discrimination* – it denied him the position because of his race – or an act of

retaliation – it denied him the position because he and Josh Goad complained to management of Mr. Springman's and Mr. Durham's racially-charged comments. Although Mr. Johnson expressly stated that his not getting the team leader position in May 1999 was the *discriminatory* act of which he complained, Johnson Dep., p. 108, he treats the claim on summary judgment as if it had been an act of *retaliation.*[4] In view of this confusion as to the precise nature of Mr. Johnson's claim at the summary judgment stage, we address the denial of the team leader position under both discrimination and retaliation rubrics.

1. *Mr. Johnson's Race Discrimination Claim.*

A plaintiff may establish a case of race discrimination using either direct or indirect evidence. Where, as here, Mr. Johnson makes no claim to direct evidence, he may proceed indirectly through the burden-shifting method outlined in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), and *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). Mr. Johnson must first establish a prima facie case. If he does, he raises a presumption of discrimination which the defendant must rebut by producing evidence of a legitimate

[4] Curiously, Mr. Johnson did not mention Cambridge's rescission of the team leader position in either of his EEOC charges – not the one he filed on November 18, 1999 alleging race discrimination, and not the one he filed on November 26, 1999 alleging retaliation.

nondiscriminatory explanation of its adverse employment action. Once the defendant meets that burden, the plaintiff must establish that the reasons proffered by the defendant were pretextual, by presenting evidence from which a trier of fact may reasonably infer that his race played a role in the challenged action or that the employer offered a phony explanation. *See Freeman v. Madison Metropolitan School Dist.,* 231 F.3d 374, (7th Cir. 2000); *Stewart v. Henderson,* 207 F.3d 374, 376 (7th Cir. 2000).

To establish a prima facie case of race discrimination, Mr. Johnson must present evidence showing that: (1) he is a member of a protected class; (2) he was performing his job satisfactorily; (3) he suffered an adverse employment action; and (4) a similarly-situated employee, not in his protected class, was treated more favorably. *Gordon v. United Airlines, Inc.,* 246 F.3d 878, 885-886 (7th Cir. 2001). Mr. Johnson's discrimination case founders at the prima facie stage. Although Cambridge argues strenuously that Mr. Johnson did not suffer an adverse employment action, we accept for purposes of resolving this motion Mr. Johnson's portrayal and assume that Cambridge's rescission of the team leader position was akin to a failure to promote and, therefore, an adverse employment action.

But Mr. Johnson presents no evidence from which a reasonable trier of fact could infer that at least one similarly-situated white employee was treated more favorably. *Ibarra v. Martin,* 143 F.3d 286, 293 (7th Cir. 1998); *Wallace v. SMC Pneumatics, Inc.,* 103 F.3d 1394, 1398 (7th Cir. 1997); *McNabola v. Chicago Transit Authority,* 10 F.3d 501, 513 (7th Cir. 1993). The only white employee who

appears to have been similarly- situated is Josh Goad, but Mr. Goad was denied the same promotion at the same time. [5] In sum, Mr. Johnson was treated the *same* as the only similarly-situated white employee with respect to denial of the team leader position.

It follows that Mr. Johnson has presented legally insufficient evidence to raise even a prima facie inference of race discrimination. Nevertheless, we will return to this claim in subpart 3 below, where we discuss the question of whether he has presented evidence from which a jury could reasonably infer that Cambridge's explanation is pretextual.

2. *Mr. Johnson's "First" Retaliation Claim.*

Assuming that Mr. Johnson's claim with respect to the team leader position is a retaliation (rather than a discrimination) claim, we distinguish it from his later retaliation charge by referring to it as his "first" retaliation claim. In addition to protecting employees from discrimination based on race, Title VII prohibits an employer from retaliating against an individual who "participates" in statutorily-protected conduct or who "opposes" conduct made unlawful by the statute. 42 U.S.C. § 2000e-3(a). *See, McDonnell v. Cisneros,* 84 F.3d 256, 262 (7th Cir. 1996).

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[5] Mr. Johnson believes (without supplying any evidence of the fact) that Mr. Goad was promoted to team leader at some point after May 1999. We find Cambridge's evidence that Mr. Goad was *never* promoted to team leader conclusive against Mr. Johnson's mere belief. Wiley Aff., ¶ 2; Def. Ex. G; Kniepkamp. Aff., ¶ 2.

In order to prevail on his retaliation claim, Mr. Johnson must show that: (1) he engaged in statutorily protected expression; (2) he suffered an adverse employment action; and (3) there is a causal relationship between the protected expression and the adverse action. *Maarouf v. Walker Manufacturing Co.*, 210 F.3d 750, 755 (7th Cir. 2000); *Alexander v. Gerhardt Enterprises Inc.*, 40 F.3d 187, 195 (7th Cir. 1994).

It is clear that Mr. Johnson engaged in statutorily protected expression by complaining about the racial slurs, and we continue to assume that denial of the team leader position was an adverse employment action. Additionally, Mr. Johnson creates a prima facie inference of causation by showing a "telling temporal sequence" of events. *E.g.*, *Horwitz v. Board of Educ. of Avoca School Dist. No. 37*, 260 F.3d 602, 612-613 (7th Cir. 2001). He applied for and was elected to the team leader position, which occasioned racially-derogatory statements by co-employees Springman and Durham, he complained of the statements, and the jobs were rescinded. Absent an explanation of its rescission of the positions, a jury could reasonably infer that the reason was because Mr. Johnson complained about Mr. Springman's and Mr. Durham's racial slurs. In sum, Mr. Johnson satisfies the initial requirements of a prima facie case.

3. *Pretext.*

Cambridge has offered a legitimate, non-discriminatory and non-retaliatory explanation of its rescission of the team leader positions. Mr. Johnson testified that Acting Plant Manager Ron Szydlowski told him that Cambridge corporate personnel changed its mind

about creating the new positions. According to Mr. Johnson, Mr. Szydlowski told him: "[I]t came down from corporate that there will be no other team leader positions, just the ones that are already appointed previously." Johnson Dep., p. 107. He testified that he did not know *who* at corporate made the decision not to add the two positions, and, perhaps understandably, he did not know whether the company's stated reason was true. Johnson Dep., p. 107.

But Mr. Johnson bears the burden of presenting legally sufficient evidence to raise an inference that the decision maker was prompted to rescind the positions by a retaliatory (or discriminatory) motive. This he has failed to do. There is simply no evidence to suggest that Cambridge has offered anything other than a legitimate non-discriminatory and non-retaliatory reason for its action or that its explanation is dishonest. *Gordon,* 246 F.3d at 888.

It is true, as we previously noted, that under certain circumstances timing alone may create an inference of retaliation. *Horwitz v. Board of Educ. of Avoca School Dist. No. 37,* 260 F.3d 602, 612-613 (7th Cir. 2001); *Silk v. City of Chicago,* 194 F.3d 788, 800-801 (7th Cir. 1999). And here we find the timing to be suspicious. In the space of a month – during May, 1999 – Cambridge posted the team leader positions, Mr. Johnson applied for one and was elected to it, Messrs. Springman and Durham made their racially derogatory comments, Mr. Johnson and Mr. Goad complained about the comments, and Cambridge rescinded the positions. The sequence is short enough in duration to raise a prima facie inference of retaliation. *E.g. Hunt-Golliday v. Metropolitan Water Reclamation Dist. of Greater Chicago,* 104 F.3d 1004, 1014 (7th Cir. 1997). Had the decision to rescind the positions been made at the

facility level – by management at the Rushville plant – we believe the evidence would establish a sufficiently "telling temporal sequence" to raise an inference of retaliation and a triable issue of fact.

But timing alone, even where telling, may not be enough to support an inference of pretext. In *Foster v. Arthur Andersen, LLP,* 168 F.3d 1029, 1034-1035 (7th Cir. 1999), the plaintiff showed that she was fired *one day* after asking for a reasonable accommodation for her disability. Yet the timing was insufficient to support an inference of pretext. The Seventh Circuit observed that "the temporal sequence analysis is not a magical formula which results in a finding of a discriminatory cause." *Id.* The plaintiff must still show that the employer's explanation for taking the adverse employment action was pretextual so that a jury could reasonably infer a causal connection between the employee's engaging in protected conduct and the adverse action. *Parkins v. Civil Constructors of Illinois, Inc.,* 163 F.3d 1027, 1032 (7th Cir. 1998); *Sanchez v. Henderson,* 188 F.3d 740, 746 (7th Cir. 1999).

Here it is uncontested that the team leader positions were rescinded by some anonymous *corporate* decision maker, not by management at the Rushville facility. Mr. Szydlowski asserted that it was a corporate decision and Mr. Johnson offers no evidence to rebut that assertion. Mr. Johnson acknowledges that he does not know *who* made the decision. Nor does he present any evidence that the decision maker, whoever it was, even *knew* about the racial slurs and about Mr. Johnson's complaint about them. This lack of evidence concerning the decision maker is fatal. As the Seventh Circuit noted in *Maarouf:* "The critical issue here . . . is whether the person who made the [employment] decision . . . was aware of the discrimination

allegations at the time, because absent such knowledge [the plaintiff] lacks a causal link between the termination and the complaint of discrimination." 210 F.3d at 755. In short, we would have to leap over too many evidentiary gaps to infer from the suspicious timing alone that the anonymous corporate decision maker knew about the racial slurs, knew about Mr. Johnson's complaint, and was motivated to rescind the positions *because* of his complaints or *because* of Mr. Johnson's race. Mr. Johnson bears the burden of persuasion on these factual issues that go to the issue of pretext, but he has not sustained that burden.

D. *Mr. Johnson's Other Race Discrimination Allegations.*

In his first EEOC charge, Mr. Johnson complained that: (1) Cambridge discriminated against him because of his race by assigning to him the more difficult, heavier jobs; (2) coworker Ross Springman had made a racial remark in May, 1999; and (3) on one occasion Materials Manager Dave Hittle had harassed him by telling him to put on his safety glasses. Def. Facts ¶ 6. We postpone discussion of the derogatory statements to our analysis of Mr. Johnson's harassment claim in subpart E below.

1. *Heavier Jobs Assignments and Safety Glass Warning.*

Mr. Johnson alleges that he was singled out for unfavorable treatment on the basis of his race by being assigned to heavier work assignments than white co-employees. Specifically, he alleges that he was assigned to work alone on tasks that white co-employees were assigned

to perform in teams of two or more. He also alleges that Materials Manager Dave Hittle harassed him by telling him to put on his safety glasses. Def. Facts ¶ 6. To be "singled out" for unfavorable treatment is, of course, the very embodiment of "disparate treatment." *Doe by Doe v. City of Belleville, Ill.*, 119 F.3d 563, (7th Cir. 1997), *vacated on other grounds, City of Belleview v. Doe by Doe,* 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998). When it is based on a criterion such as race, it is unlawful. When it persists it may constitute harassment.

Although we accept Mr. Johnson's assertions that he handled heavier work assignments than other employees, and that Mr. Hittle warned him to put his safety glasses on, Mr. Johnson has presented legally insufficient evidence to support the claim that he was assigned the heavier tasks and told to wear his safety glasses *because of his race.*

As to the assignments, in his deposition testimony Mr. Johnson vacillates between depicting the heavier assignments as a sign of race discrimination and bragging about them as a sign of his superior abilities. Mr. Johnson undermines his race claim (and certainly the broader suggestions of pattern and practice discrimination that characterize his summary judgment brief) by testifying that he was the *only* production employee who worked on the heavier assignments alone, so that no other African American employees were assigned to work on them alone. Johnson Dep., pp. 121-125, 129-130. He also testified that he was able to accomplish more working alone than teams of other employees could achieve and that his superior work performance would have been a good reason for Mr. Wiley to assign him to work alone. Johnson Dep., 136-138,

139. He also testified that he worked better by himself. Johnson Dep., p. 102.

Even if we assume that Mr. Johnson's evidence were sufficient to raise a prima facie inference of discrimination or harassment – he was assigned to work alone on projects that were ordinarily undertaken by teams of employees – it would be unreasonable to infer from the evidence that the reason for making such assignments was race. Where, as here, the plaintiff agrees that he got the job done by himself, that he worked better by himself, and that it was understandable that Mr. Wiley would assign him to work alone because of his abilities, a jury could not reasonably infer that the explanation was a pretext for race discrimination or that assignments were a form of harassment.

Nor could a jury reasonably infer that Mr. Hittle singled out Mr. Johnson for unfavorable treatment by warning him to wear safety glasses. Mr. Johnson acknowledges that wearing safety glasses is a company work requirement. He also acknowledges that Mr. Hittle "came up and just told me, put my glasses on before I lose that other eye . . . ." Johnson Dep., p. 170. Even if, as Mr. Johnson alleges, Mr. Hittle had just come from a group of white employees who were not wearing safety glasses, we could not infer, based solely on his caution to Mr. Johnson, that he was singling out Mr. Johnson for unfavorable treatment.[6]

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[6] We give this action by Mr. Hittle the favorable spin to which Mr. Johnson is entitled at this stage of the proceedings, but note that Mr. Hittle's gesture could be interpreted just as reasonably as an expression of kind solicitousness with regard to Mr. Johnson's safety.

In sum, Mr. Johnson has presented legally insufficient evidence that he was the victim of race discrimination in that the terms and conditions of his employment were, because of his race, less favorable than those of similarly-situated white employees.

E. *Mr. Johnson's Harassment Claim.*

In addition to protecting employees from disparate treatment based on unlawful criteria, Title VII also prohibits employers from creating, condoning, or tolerating a hostile work environment. A "hostile" work environment is one that is "permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Shanoff v. Illinois Dept. of Human Services,* 258 F.3d 696, 704 (7th Cir. 2001) (internal citations omitted); *Adusumilli,* 164 F.3d at 361. The issue of whether the work environment is hostile "turns on whether the alleged harassment occurred because of the [race] of the complainant." *Haugerud v. Amery School District,* 259 F.3d 678, 692 (7th Cir. 2001). In other words, the question is whether the employee was "'exposed to disadvantageous terms or conditions of employment to which members of the other [race were] not exposed.'" *Id. quoting Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 80, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998)

Proof of hostile environment is two pronged. In order to prevail, the plaintiff must present evidence sufficient to raise a reasonable inference that he *subjectively* experienced the environment to be abusive; he must also show, *objectively,* that a reasonable person in his position also

would have perceived it to be hostile. *Haugerud,* 259 F.3d at 693; *Adusumilli,* 164 F.3d at 361. In order to determine whether the work environment is *objectively* hostile, we consider all of the circumstances, including "the frequency of the discriminatory conduct, its severity, whether it was physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Haugerud,* 259 F.3d at 693.

Since the Supreme Court's clarifying decisions in 1998, analysis of employer liability for hostile environment harassment has depended upon whether the harassment was committed by a supervisor or by a co-worker and whether or not the harassment culminated in a tangible employment action. *Burlington Industries v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998).

In analyzing whether Mr. Johnson was subjected to a racially hostile work environment, we ask whether all of the incidents he enumerates, considered cumulatively, would constitute sufficient evidence for a jury to infer race harassment. *Silk v. City of Chicago,* 194 F.3d 788, 807-808 (7th Cir. 1999); *Sweeney v. West,* 149 F.3d 550, 556-557 (7th Cir. 1998); *Galloway v. General Motors Service Parts Operations,* 78 F.3d 1164, 1166 (7th Cir. 1996). We find that they do not.

Mr. Johnson enumerates the following incidents in support of his hostile environment claim:

- Mr. Johnson was subjected to racially derogatory remarks made by Ross Springman and Brian Durham.

- Mr. Szydlowski ordered him to sit down while Mr. Szydlowski gave Mr. Johnson a document enumerating instances of Mr. Johnson's allegedly poor conduct at work. Johnson Dep., pp. 175-178. He also told Mr. Johnson that he would not hesitate to fire him for insubordination. Johnson Dep., p. 182.
- Mr. Hittle told Mr. Johnson to put on his safety glasses. Johnson Dep., p. 170.
- Mr. Szydlowski ordered him to get off the phone and get back to work while Mr. Johnson was using the phone during a break. Johnson Dep., pp. 185-188.
- Mr. Wiley assigned him heavier jobs than similarly-situated white employees. Johnson Dep., 121-125, 129-130.

1. *The Derogatory Comments.*

It is uncontested that co-employees Ross Springman and Brian Durham used racially derogatory expressions in May 1999. It is also uncontested that both were co-employees and not management. Where, as here, the alleged harassment was committed by co-employees, the employer is not subject to strict liability. Instead, Mr. Johnson must show that Cambridge was negligent in order to hold it liable for co-worker harassment. *Adusumilli v. City of Chicago,* 164 F.3d 353, 361 (7th Cir. 1998), *cert. denied,* 528 U.S. 988, 120 S.Ct. 450, 145 L.Ed.2d 367 (1999). In other words, an employer is liable where it knows or should know of the harassment and fails to take prompt remedial action. *Savino v. C.P. Hall Co.,* 199 F.3d 925, 933-934 (7th Cir. 1999).

Even assuming that the derogatory comments rise to the level of harassment, it is clear that, when notified of them, Cambridge counseled both Mr. Springman and Mr. Durham. Mr. Springman apologized. Additionally, Mr. Johnson acknowledges that Mr. Springman appeared concerned that he might lose his job over the incident. Def. Facts, ¶ 18. Mr. Johnson acknowledges that he is unaware of any other racially derogatory comments that Mr. Springman may have made after the remark of May 1999. Def. Facts, ¶ 19. Mr. Durham's employment was terminated within a few days (although we do not know whether he was fired or he resigned). Mr. Durham's departure, for whatever reason, served the salutary purpose of removing a racial troglodyte from the work place so that his remarks would never be repeated.

In other words, even assuming that the comments of May 1999 rose to the level of actionable harassment, Cambridge took appropriate action to prevent a recurrence of such incidents. The Seventh Circuit recently reiterated:

> If an employer takes reasonable steps to discover and rectify the harassment of its employees . . . it has discharged its legal duty. An employer's response to alleged instances of employee harassment must be reasonably calculated to prevent further harassment under the particular facts and circumstances of the case at the time the allegations are made. We are not to focus solely upon whether the remedial activity ultimately succeeded, but instead should determine whether the employer's total response was reasonable under the circumstances as then existed. The reasonableness of an employer's response depends, in part, on the gravity of the harassment alleged.

Berry v. Delta Airlines, Inc., 260 F.3d 803, 811 (7th Cir. 2001), *quoting, McKenzie v. Illinois Dept. of Transp.*, 92 F.3d 473, 480 (7th Cir. 1996).

2. *The Other Incidents.*

We have already discussed the safety glasses incident and the heavier jobs. As to Mr. Szydlowski ordering Mr. Johnson to sit down and threatening Mr. Johnson that he would not hesitate to fire him for insubordination, Mr. Johnson did *not* in fact sit down; instead, he walked out of the office, and was not fired for insubordination or for anything else. Johnson Dep., pp. 182-183. While we have no reason to doubt that Mr. Johnson found these other enumerated incidents to be subjectively distressing and believed that they were based on his race, they are, *objectively,* so innocuous as to fall well below the threshold of what the law regards as hostile environment harassment. That is, they were not sufficiently severe or pervasive as to alter the terms and conditions of Mr. Johnson's employment. *See, Haugerud,* 259 F.3d at 693; *Silk,* 194 F.3d at 808; *Baskerville v. Culligan International Co.*, 50 F.3d 428 (7th Cir. 1995).

F. *Mr. Johnson's "Second" Retaliation Claim.*

In his second EEOC charge, Mr. Johnson alleged that he was the victim of retaliation for having complained about the racial incidents and having filed the first charge. *In addition* to the incidents enumerated in sub-section E above, Mr. Johnson also alleges that the following incidents and events support his retaliation claim.

- Mr. Johnson alleged in his charge that Cambridge refused to provide a back brace that he

required and that was ordered by his physician for a work related injury.

- He also alleged in his charge that a physician also prescribed pain medication, but that he was not permitted to use it while on the job.
- On January 20, 2000 and again on February 2, 2000, Mr. Szydlowski gave to Mr. Johnson two, substantially identical, formal Notifications of Unsatisfactory Conduct. The January notice enumerated twelve instances of unsatisfactory conduct and the February notice enumerated nine. Def. Ex. 34; Pl.Ex. "EEOC Resp. to FOIA Req.," 68.
- Mr. Johnson was given an employee vacation warning. Mr. Johnson claims that Cambridge took away vacation days on the theory that he had taken more vacation than he as entitled to. Mr. Johnson alleges that Cambridge's claim is false.

We have already set forth the criteria for a retaliation claim. We note here that Mr. Johnson's retaliation claim is fatally defective in two ways. First, none of the incidents, nor all of them together, rise to the level of an adverse employment action. Second, he provides us no reason to link the events causally to his complaint of discrimination.

Since the Supreme Court's decisions in *Burlington Industries v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998) and *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), the courts have consistently adhered to the view that an adverse employment action (whether in a harassment or retaliation case) is one that causes a substantial change in employment. The Supreme Court has stated that: "A

tangible employment action constitutes a *significant* change in employment status, such as hiring, firing, failing to promote, reassignment with *significantly* different responsibilities, or a decision causing a *significant* change in benefits." *Ellerth,* 118 S.Ct. at 2268 (emphasis added). *See Savino v. C.P.Hall Company,* 199 F.3d 925, 933 (7th Cir. 1999). In *Silk v. City of Chicago,* 194 F.3d 788, 807-808 (7th Cir. 1999) the Seventh Circuit, refusing to find an adverse employment action for purposes of harassment or retaliation claims, stated:

> [Sergeant Silk] has alleged no demotion in rank, no diminution of salary. He has continued to do his job without impediment from the harassing actions of others. . . . . Sergeant Silk failed to demonstrate that the workplace was permeated with discriminatory conduct – ridicule, intimidation, insult – that was sufficiently severe or pervasive to alter the conditions of his employment . . . . In the end, his claims fail because he cannot prove that he suffered a materially adverse action. We hold that the district court was correct in granting summary judgment "[b]ecause of the lack of support for either a harassment or retaliation theory under the ADA or the Rehabilitation Act."

Mr. Johnson focuses considerable attention on the notices of unsatisfactory conduct. In *Grube v. Lau Industries, Inc.,* 257 F.3d 723, 729-730 (7th Cir. 2001), the Seventh Circuit reiterated that: "unfair reprimands or negative performance evaluations, unaccompanied by some tangible job consequence, do not constitute adverse employment actions." See *Sweeney v. West,* 149 F.3d 550, 556-557 (7th Cir. 1998); *Smart v. Ball State University,* 89 F.3d 437, 442 (7th Cir. 1996). Although Mr. Johnson

argues that the notices were fabricated for the purpose of generating a paper trail that could be used to justify his termination, the fact remains that Mr. Johnson has not been terminated. In fact, the record is devoid of any evidence that might raise an inference that he has been materially deprived of any employment benefit or opportunity.[7]

As to the back brace, Cambridge asserts that it could not issue Mr. Johnson a back brace until he revealed the size he needed. Once he revealed the size, one was provided. As to the pain medication, Mr. Johnson acknowledges that Cambridge has a policy which prohibits employees from using prescription medications when the medications might present a work hazard. There is no evidence to support an inference that either of these explanations by Cambridge is either pretextual or based on race.

IV. Conclusion.

This is one of those cases which exemplify the toxicity of racial slurs in the work place. Once aired, their poison tends to infect the victim with understandable suspicion about the employer's motives as to almost any practice, no

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[7] With respect to the loss of vacation pay, plaintiff may not simply say that Cambridge's statement that Mr. Johnson had used too much vacation is "false." Mr. Johnson has the burden of raising an inference of pretext. Accordingly, he must show that the explanation is *dishonest.* A false belief, honestly held, is not a pretext. *O'Regan v. Arbitration Forums, Inc.,* 246 F.3d 975, 983 (7th Cir. 2001); *Kulumani v. Blue Cross Blue Shield Ass'n,* 224 F.3d 681, 685 (7th Cir.2000).

matter how innocuous. The law of discrimination, harassment, and retaliation, however, requires more than suspicion, no matter how justifiable. It requires evidence from which a reasonable trier of fact may infer a discriminatory or retaliatory motive. Mr. Johnson has failed to adduce enough evidence to meet that threshold requirement.

Accordingly, we GRANT Cambridge's motion for summary judgment and dismiss plaintiff's complaint, pursuant to Fed.R.Civ.P. 56.

It is so ORDERED this 28th day of January 2001.

/s/ Sarah Evans Barker
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DARYL L. JOHNSON, Plaintiff, v. CAMBRIDGE INDUSTRIES, INC., and MERIDIAN AUTOMOTIVE SYSTEMS, INC., Defendants.	)	Case No. IP00-1540-C-B/S

FINAL JUDGMENT

The Court having entered its entry on summary judgment in favor of the defendant Meridian Automotive Systems, Inc., and having made an express determination pursuant to Rule 54(b) of the Federal Rules of Civil Procedure that there is no just reason for delay, IT IS ORDERED that Final Judgment be entered for the defendant Meridian Automotive Systems, Inc. and against the plaintiff, each party to bear its own costs.

It is so ORDERED this 28th day of February, 2002.

/s/ Sarah Evans Barker
SARAH EVANS BARKER,
JUDGE
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Southern District of Indiana

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APPENDIX D

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 2, 2003

Before

Hon. Richard D. Cudahy, *Circuit Judge*

Hon. Diane P. Wood, *Circuit Judge*

Hon. Ann Claire Williams, *Circuit Judge*

No. 02-1749	]
DARYL L. JOHNSON,	]
Plaintiff-Appellant,	] Appeal from the United States District Court for the Southern [sic] of Indiana Indianapolis Division
CAMBRIDGE INDUSTRIES, INC., and MERIDIAN AUTOMOTIVE SYSTEMS, INC.,	] No. IP00-1540-C-B/S
Defendants-Appellees.	] **Sara Evans Barker**, *Judge*.

ORDER

On consideration of the petition for rehearing and filed by counsel for the Plaintiff-Appellant, Daryl L. Johnson on April 23, 2003, all members of the original panel have voted to **DENY** the petition for rehearing.

Accordingly, the petition for rehearing is hereby **DENIED.**

APPENDIX E

Local Rule 56.1 – Summary Judgment Procedure

(a) ***Requirements for Moving Party.*** A party filing a motion for summary judgment pursuant to FED. R. CIV. P. 56 must also serve and file the following:

(1) a Statement of Material Facts (either as a section of the brief or as a separate document), in compliance with L.R. 56.1(f), as to which the moving party contends there is no genuine issue and that entitles the moving party to a judgment as a matter of law;

(2) to the extent not previously filed, any affidavits and other admissible evidence the moving party relies upon to support the facts material to the motion, including, but not limited to, portions of depositions and discovery responses; and

(3) a supporting brief.

(b) ***Requirements for Non-Movant.*** A party opposing a motion filed pursuant to Fed. R. Civ. P. 56 must, on or before the 30th day after service of the motion, serve and file the following:

(1) a Response to Statement of Material Facts (either as a section of the brief or as a separate document) in compliance with L.R. 56.1(f) that contains a response to each material factual assertion in the moving party's Statement of Material Facts, and if applicable, a separate Statement of Additional Material Facts that warrant denial of summary judgment;

(2) to the extent not previously filed, any additional affidavits and other admissible evidence to

support material facts the opposing party relies upon under L.R. 56.1(b)(1), including, but not limited to, portions of depositions and discovery responses; and

(3) an answer brief.

(c) ***Reply Brief.*** On or before the 15th day after service of an opposing party's answer brief, the moving party may serve and file a reply brief. If the opposing party has submitted a Response to Statement of Material facts and/or a Statement of Additional Material Facts, and if the moving party objects to the cited evidence, the moving party may submit a Reply to Response to Statement of Material Facts and/or a Reply to Statement of Additional Material Facts (either as a section of the brief or as a separate document) containing the objections on or before the due date for filing a reply brief that complies with L.R. 56.1(f)(1) and 56.1(f)(3)-(4).

(d) ***New Evidence on Reply or Surreply.***

(1) At the time of filing its reply brief, the moving party may supplement its filing of admissible evidence under L.R. 56.1(a)(2) only to the extent such additional evidence responds to the opposing party's Response to Statement of material Facts and/or Statement of Additional Material Facts, and in compliance with L.R. 56.1(f). Such evidence shall be specifically labeled Statement of Additional Evidence on Reply (either as a section of the brief or as a separate document).

(2) In the event the moving party submits any additional evidence with its reply brief or objects to the admissibility of evidence cited in

opposition to the motion, the non-movant may file a Surreply to Additional Material Facts and/or a surreply brief responding only to the moving party's new evidence and/or objections no later than 7 days after service of the moving party's reply brief. A Surreply to Additional Material Facts shall comply with L.R. 56.1(f) and may be accompanied by additional evidence to the extent it is responsive to the moving party's new evidence and/or objections.

(3) Other than as specifically set forth above, evidence may not be filed on reply or following reply by either party without leave of Court.

(e) ***Time for Submission.*** Any motion for summary judgment shall be filed at such a time as to be fully briefed 120 days before the trial date unless an earlier or later deadline is provided by order (see L.R. 16.1) or the case management plan. Because of the potential impact on the trial date, motions for extensions of time to file summary judgment or to serve and file supporting or opposing submissions under L.R. 56.1(b), (c) and (d) must specify the trial date and any other subsequent schedule or date that the extension might affect and must recite any previous extensions of time obtained. Extensions of time shall only be granted for good cause shown. The briefing schedule in this rule applies to any motion for summary judgment, notwithstanding the provisions of Local Rule 7.1.

(f) ***Requirements for Factual Statements and Responses Thereto.***

(1) *Format and Numbering.* The Statement of Material Facts shall consist of numbered sentences. The Response to Statement of Material

Facts must be numbered to correspond with the sentence numbers of the Statement of Material Facts, preferably with each respective factual statement repeated therein. Any Statement of Additional Material Facts must consist of numbered sentences and start with the next number after the last numbered sentence in the Statement of Material Facts. The Reply to Response to Statement of Material Facts, Reply to Statement of Additional Material Facts, Statement of Additional Evidence on Reply, and Surreply to Additional Material Facts must be numbered in a similar fashion, to correspond to the specific material fact to which they are responsive and with any additional facts numbered consecutively therefrom.

(2) *Format of Factual Assertions.* Each material fact set forth in a Statement of Material Facts, Response to Statement of Material Facts, Statement of Additional Material Facts, Statement of Additional Evidence on Reply, or Surreply to Additional Material Facts must consist of concise, numbered sentences with the contents of each sentence limited as far as practicable to a single factual proposition. Each stated material fact shall be substantiated by specific citation to record evidence. Such citation shall be by page number and paragraph or line number, if possible.

(3) *Format of Objections to Asserted Material Facts or Cited Evidence.* Objections to material facts and/or cited evidence shall (to the extent practicable) set forth the grounds for the objection in a concise, single sentence, with citation to appropriate authorities.

(4) In addition to filing and exchange of all required documents in hard copy format, whenever possible, the parties should exchange their factual Statements in electronic format on 3.5" computer disk. In certain cases the court may ask the parties to submit copies of all summary judgment filings in electronic format.

(g) ***Effect of Factual Assertions.*** In determining the motion for summary judgment, the Court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are specifically controverted or objected to in compliance with L.R. 56.1(f). The Court will also assume for purposes of deciding the motion that any facts asserted by an opposing party are true to the extent they are supported by the depositions, discovery responses, affidavits or other admissible evidence.

(h) ***Definition of Material Fact.*** For purposes of summary judgment, a material fact is a potentially outcome determinative fact.

(i) ***Oral Argument or Hearing.*** All motions for summary judgment will be considered as submitted for ruling without oral argument or hearing unless a request for such is granted under L.R. 7.5 or the Court otherwise directs.

(j) ***Notice to Pro Se Litigants.*** If a party is proceeding pro se and an opposing party files a motion for summary judgment, counsel for the moving party must subit a notice to the unrepresented opposing party that:

(1) briefly and plainly states that a fact stated in the moving party's Statement of Material Facts and supported by admissible evidence will be accepted by the Court as true unless the opposing party cites specific admissible evidence contradicting that statement of a material fact; and

(2) sets forth the full text of FED. R. CIV. P. 56 and S.D. IND. L.R. 56.1; and

(3) otherwise complies with applicable case law regarding required notice to pro se litigants opposing summary judgment motions.

(k) ***Compliance.*** The court may, in the interests of justice or for good cause, excuse failure to comply strictly with the terms of this rule.

Local Rule 56.1 amended effective January 1, 2000. Previous major amendment enacted December 17, 1998, and effective as to any motions for summary judgment filed on or after January 1, 1999, further revised April 30, 1999.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DARYL L. JOHNSON,

Plaintiff,

v.

CAMBRIDGE INDUSTRIES, INC., and MERIDIAN AUTOMOTIVE SYSTEMS, INC.,

Defendants.

Case No. IPOO-1540-C-B/S

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MERIDIAN'S REPLY TO PLAINTIFF'S RESPONSE TO STATEMENT OF MATERIAL FACTS

AND

MERIDIAN'S REPLY TO PLAINTIFF'S STATEMENT OF ADDITIONAL MATERIAL FACTS

* * *

102. In the Fall of 1999, Josh Goad was given the job of Team Leader, but Daryl Johnson was not. Johnson Aff. ¶ 35.

***Meridian's Response*: Solely for the purpose of this motion, Meridian will assume this fact exists without controversy.**

* * *

195. The employer did not promote Daryl Johnson to Team Leader in the Fall of 1999 when Josh Goad was promoted back to Team Leader. Johnson Aff. ¶ 126.

***Meridian's Response*: Solely for the purpose of this motion, Meridian will assume this fact exists without controversy. Plaintiff has presented no admissible evidence that he applied or was qualified for any Team Leader position in the Fall of 1999.**

* * *

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DARYL L. JOHNSON, Plaintiff, v. CAMBRIDGE INDUSTRIES, INC., and MERIDIAN AUTOMOTIVE SYSTEMS, INC., Defendants.	Case No. IP00-1540-C-B/S

PLAINTIFF'S SURREPLY TO

MERIDIAN'S REPLY TO PLAINTIFF'S RESPONSE TO STATEMENT OF MATERIAL FACTS

AND

MERIDIAN'S REPLY TO PLAINTIFF'S STATEMENT OF ADDITIONAL MATERIAL FACTS

* * *

102. In the Fall of 1999, Josh Goad was given the job of Team Leader, but Daryl Johnson was not. Johnson Aff. ¶ 35.

***Meridian's Response*: Solely for the purpose of this motion, Meridian will assume this fact exists without controversy.**

* * *

195. The employer did not promote Daryl Johnson to Team Leader in the Fall of 1999 when Josh Goad was promoted back to Team Leader. Johnson Aff. ¶ 126.

***Meridian's Response*: Solely for the purpose of this motion, Meridian will assume this fact exists without controversy. Plaintiff has presented no admissible evidence that he applied or was qualified for any Team Leader position in the Fall of 1999.**

***Surreply*:** The defendant does not dispute or object to any fact in this number. The defendant has made no claim that it posted the position again or requested applications for it in the Fall of 1999.

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DARYL L. JOHNSON, Plaintiff, v. CAMBRIDGE INDUSTRIES, INC., and MERIDIAN AUTOMOTIVE SYSTEMS, INC., Defendants.	Case No. IP00-1540-C-B/S

PLAINTIFF'S SURREPLY IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

* * *

The defendant's argument is one of pretext, not one of adverse employment action. In this case, the timing of the decision is very strong evidence of pretext, coming within days of the complaints of discrimination, the suspension of Springman, the memorandum to Springman, and the memorandum to plaintiff if it was not back-dated. The fact that both of the employees who had the position taken away were the two employees who first complained about the race discrimination is also evidence of pretext. The fact that Josh Goad, who did not continue to complain about race discrimination to management, was promoted to team leader in the Fall of 1999 and that plaintiff, who did continue to complain, was not promoted is also evidence of pretext. Fact Nos.

102, 195. The fact that plaintiff was not promoted to team leader when Team Leader Josh Goad quit in January, 2000 is also evidence of pretext. Fact 196.

* * *